

OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Arbitration Between

The City of Richfield, Minnesota (Police Department)

and

Law Enforcement Labor Services, Inc., Local No. 123

(Andrew H. Gifford, Grievant)

Minnesota Bureau of Mediation Services

Issued June 17, 2006
Case No. BMS 06-PA-53

OPINION

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. A hearing was conducted on May 3, 2006, in Richfield, Minnesota. Law Enforcement Labor Services, Inc., Local Union 123 (Union) was represented by Marylee Abrams, attorney at law, with offices in St. Paul, Minnesota. The City of Richfield, Minnesota (City) was represented by John M. LeFevre, attorney at law, with offices in Minneapolis, Minnesota.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No court reporter was present and the Arbitrator informally tape recorded parts of the proceedings. After the witnesses were heard and the exhibits were presented, the parties submitted simultaneous written closing statements. These closing statements were timely sent and received on or before Thursday, May 18, 2006. Thereafter, the grievance was deemed submitted and the record closed.

Issue

The parties agreed on the exact statement of the issue to be resolved:

Was the ten (10) day suspension of Officer Andrew H. Gifford, effective June 28, 2005, for just cause, and if not, what is the appropriate remedy?

No procedural issues were raised by the parties.

Relevant Contractual Provisions

ARTICLE 9: DISCIPLINE

9.2 The Employer will discipline non-probationary Employees for just cause only. Discipline will be in one or more of the following forms: (a) documented oral reprimand; (b) written reprimand; (c) suspension with or without pay; (d) demotion; or (e) discharge.

9.3 Suspension, demotions and discharges will be in written form.

Summary of Relevant Facts

The Parties

The City is a police department located in the Minneapolis/St. Paul metropolitan area. A total of 44 sworn personnel are employed by the City, including 3 lieutenants, 8 sergeants, 4 detectives, 28 police officers and Captain Barry C. Fritz.

The Union is the exclusive representative for all of the police officers and police detectives employed by the City. The parties concur that the collective bargaining agreement effective for the period beginning January 1, 2005 and ending December 31, 2006 (CBA), is applicable to this case.

Officer Andrew H. Gifford (the Grievant or Officer Gifford) has been employed by the City since August 10, 1998. At the time this grievance was filed, Officer Gifford was assigned to the City's Crime Prevention Unit. Officer Gifford has also served as a Juvenile Liaison officer.

In addition to his assignment to the Crime Prevention Unit, Officer Gifford was, prior to the date of the discipline, also serving in a position entitled "Explorer Coordinator." The duties of this position relates to a program operated by the City called the "Explorer Scout Program." This program permits young people who have an interest in law enforcement to work with City police officers in certain types of law enforcement related activities. The officer holding the position of Explorer Coordinator receives compensation in addition to regular pay.

Officer Gifford's Disciplinary and Work Performance History

Officer Gifford's annual performance evaluations appear to be satisfactory. The record contains several commendations. The record also contains three items of discipline, prior to the current matter.

The first item is a written reprimand, issued on October 9, 2001. This discipline was administered due to Officer Gifford's improper confiscation of personal property from the subject of a traffic stop, as well as the failure to properly inventory and preserve the personal property.

The second item was also a written reprimand, issued on February 26, 2002. This discipline was administered for having three preventable accidents within a three year period.

The final item of discipline was issued to Officer Gifford on May 6, 2005. Officer Gifford was verbally reprimanded by Sergeant Mike Flaherty for improper pat down of juvenile students in connection with the issuance of citations to them for smoking cigarettes. Sergeant Flaherty's oral reprimand made specific reference to Department Directive No. 258, stating in part the "The Department expects officers to handle juveniles consistent with common sense and the dictate of states law . . . Officers should use the least coercive among reasonable alternatives, consistent with preserving public safety, order, and individual liberty."

Event Concerning the Molina Vehicle

On the evening of May 24, 2005, Officer Gifford was assigned to perform checks that test whether or not local merchants are selling alcohol in compliance with law. Officer Eric Lammle was working with Officer Gifford on this occasion. Three “compliance checkers” were also working with Officer Gifford and Officer Lammle. These young men were Lawrence E. Doig, Josh Newville and Neil L. Rivers. Mr. Rivers and Mr. Doig were, at that time, current participants in the City’s Explorer Scout Program. All the compliance checkers were under the age of 21. For this particular activity, it was routine for these young compliance checkers to enter a store that sells alcohol and attempt to purchase the product despite their lack of legal status to do so. The vehicle being used by this team was an unmarked auto owned by the City. At all times pertinent, Officer Gifford was the driver of the unmarked automobile.

During Officer Gifford’s shift, the team performed one of these compliance checks at the El Jalapeno Market, located at 15th Avenue and 66th Street in the City of Richfield. Thereafter, Officer Gifford, Officer Lammle and the young men functioning as compliance checkers observed a vehicle containing two male occupants driving erratically in the store parking lot. The evidence established that the driver of this vehicle was later identified as Hector Molina. The passenger, according to the evidence, was his brother, Ignacio Molina.

As the vehicle passed closely to him, Officer Gifford thought he heard Hector Molina shout a profanity at him. The vehicle exited the parking lot, turning west on 66th Street. Officer Gifford followed. While on 66th Street, Mr. Molina continued to drive

erratically including several lane changes without applying the proper signal. Neither Officer Gifford nor Officer Lammle called for a marked squad car or even discussed doing so.

While driving in the right hand lane, Officer Gifford ultimately drew up to the Molina car as it proceeded down 66th street. Suddenly, Mr. Molina made an unexpected hard left turn on to Tenth Avenue, where he came to a quick stop in the middle of the street. Upon arriving at the place where Mr. Molina had stopped his car, both Officer Gifford and Officer Lammle exited the City's vehicle and upholstered their weapons. Both Molina brothers were patted down for weapons and were secured without further incident. After both cars were stopped, a marked squad car was called and appeared on the scene to assist. Hector Molina was cited for improper lane changes and both men were thereafter released.

A few days later, Hector and Ignacio Molina filed a complaint against the City in connection with this event. They alleged than an improper traffic stop was conducted. They further alleged that when the officers pointed their weapons at them, they had used what they considered to be excessive force.

The Investigation

Over the next several weeks, Lieutenant Todd Sandell conducted an investigation of this incident. The investigation consisted of the statements of Hector and Ignacio Molina, Officer Gifford, Officer Lammle, and the three Code Compliance Checkers, Mr.

Doig, Mr. Newville and Mr. Rivers. Lieutenant Sandell additionally reviewed the dispatch tape and visited the scene.

On or about June 22, 2005, Lieutenant Sandell sent a memorandum to Officer Gifford entitled "Employee Notification of Investigative Results." In this memo, Lieutenant Sandell advised Officer Gifford of the following findings:

- Dismissing the charge of Unauthorized Use of a Firearm (Department Directive No. 211).
- Dismissing the charge of Failure to Complete Incident Report (Department Directive 115).
- Sustaining the charge of using an unmarked vehicle for a traffic stop (Department Directive 269).

At the hearing, Officer Gifford took full responsibility for having violated Department Directive No. 269, using an unmarked vehicle for a traffic stop.

On June 23, 2005, Officer Lammle was issued a written reprimand for violating that policy. The written reprimand, issued by Lieutenant Sandell, explained the reason for Department Directive No. 269. "There is," Lieutenant Sandell stated, "a risk factor involved in any traffic stop, however, you greatly increase that risk factor by conducting the stop in civilian clothing and driving an unmarked department vehicle . . . Your conduct also placed three civilian employees in a high-risk situation."

Officer Lammle did not contest the issuance of the written reprimand.

Alleged Violation of Department Directive No. 105

In addition to notifying him of his conclusions in the firearm, reporting and traffic enforcement directives, Lieutenant Sandell advised Officer Gifford of one additional charge not related to the events of May 24, 2005. Specifically, Lieutenant Sandell informed Officer Gifford that he had violated Department Directive No. 105, General Standard of Conduct, requiring every officer to “respond truthfully to all legitimate inquiries by supervisors or superiors.”

According to his internal investigation report, Lieutenant Sandell asked Officer Gifford, at one point in the interview, whether he had displayed his badge “out the window of the vehicle you were driving.” Officer Gifford’s statement indicates that he answer this question by saying “no.” Thereafter, Lieutenant Sandell asked Officer Gifford the question set forth below, eliciting the response cited:

Lieutenant Sandell: Final clarification. At no time did you identify yourself between leaving the El Jalopena Market and when you pulled behind this vehicle on Tenth Avenue. At no time during that route did you identify yourself as police officer?
Officer Gifford: No.

Lieutenant Sandell was unable to square this portion of Officer Gifford’s statement with the statements given by other witness. Officer Lammle, for example, testified that Officer Gifford has “pulled his badge out.” Mr. Doig, Mr. Newville and Mr. Rivers all recalled that Officer Gifford displayed his badge to the Molina brothers.

Based on these statements, Lieutenant Sandell made the following conclusion:

Although there are inconsistencies between the witnesses as to the exact time and matter (sic) in which Officer Gifford displayed his badge toward

the Molina vehicle. (sic) There is sufficient evidence that at some point while pursuing the Molina vehicle Officer Gifford attempted to identify himself as a police officer by displaying his badge. Therefore the preponderance of evidence is that Officer Gifford was untruthful during his . . . statement.

In his final investigative report, Lieutenant Sandell concluded that although “he was not going to perform a traffic stop and intended to call for a marked squad . . . he never communicated this intention to Officer Lammle who had control of the radio.”

Although it was against his interests, Officer Gifford was quite clear and candid when asked about this matter in the *Garrity* interview. He told Lieutenant Sandell that he never told Officer Lammle to call for a marked squad. Officer Gifford’s statement also contains the following exchange:

Lt. Sandell	So, it was just in your mind that you were going to call for a marked squad?
Officer Gifford	That was my intention, yeah.
Lt. Sandell	It was your intention, but it was never done.
Officer Gifford	Correct.

The Discipline

The results of the investigation, including Lieutenant Sandell’s conclusions regarding Officer Gifford’s alleged violation of Department Direction 105, were forwarded to Captain Fritz. On June 28, 2005, Captain Fritz imposed a 10-day unpaid suspension. In addition, Captain Fritz relieved Officer Gifford of his duties relating to the explorer program as a further item of discipline.

In his memorandum of disciplinary action, Captain Fritz stated as follows:

In your statement you deny displaying the badge. However, five persons dispute your claim; all three Code Compliance Checkers, Officer Lammle, and the passenger complainant. You made the same denial to me during your administrative hearing. I find it impossible to disclaim their statement in favor of yours.

The grievance was filed on behalf of Officer Gifford shortly thereafter.

Pertinent City Policies

Department Directive No. 269 provides in pertinent part that “Unmarked Vehicles shall not be used for traffic enforcement.”

Department Directive No. 105 (General Standards of Conduct) provides as follows:

Employees **shall** respond truthfully to all legitimate inquiries by supervisors or superiors. Any form of deception; such as, but not limited to; a misleading response or denial based upon a technicality of the inquiry rather than the substance of the inquiry; a lapse or failure of memory which is inconsistent with the totality of the event in question; a partial response which is less than fully candid; or, any response other than a complete and candid response to the best of the Employee’s ability and recollection; **shall** constitute an untruthful response. (emphasis original)

Positions of the Parties

The City

The City begins its statement of position by discussing the powers of the arbitrator in cases such as this. Several decisions of the Minnesota state courts are cited for the following propositions:

- Where a collective bargaining agreement does not specifically define what acts constitute just cause for discharge, the question is appropriately left to the arbitrator.
- A determination that the failure to discharge duties has occurred, such as “honesty, punctuality [and] sobriety,” is appropriately within the arbitrator’s power.
- The “just cause” standard is satisfied when “the employee has breached his or her duty to the employer in some way,” including the “failure to adhere to significant departmental rules and regulations.”
- Just cause requires the assessment of a reasonable penalty.
- The evidence showing the existence of reasons for discipline must be “substantial.”

Here, the City asserts, the investigation clearly establishes that Officer Gifford violated the rule against using an unmarked vehicle for traffic enforcement. The evidence shows that this policy is important, the City argues. “Citizens who have encounters with police officers generally expect that they will be on notice that they are dealing with real police officers from a real police department.” The City points out that Officer Gifford and his young “compliance checkers” were, during the pertinent events, attired in “plain clothes.”

The City further notes that, in this case, Officer Gifford engaged the Molina vehicle for traffic enforcement reasons. “In short,” the City maintains, the proposition that “Officer Gifford was guilty of a serious violation of City Policy Directive 269” was “well supported” by the record.

However, from its written statement, it is clear that the City considers the second charge, described as the “failure to respond truthfully during his Garrity interview,” as the more serious charge and the motivation for the discipline. The City refers directly to Policy Directive 105-6, requiring a “fully candid” response to every investigatory question. “The integrity of the investigation process depends on officers begin truthful in their statements,” declares the City. The authority for the investigation, cited as *Garrity v. State of New Jersey*, 385 U.S. 493 (1967), is provided.

The City takes the position that Officer Gifford “received several warnings” about the need to be truthful in the investigative process, including:

- Officer Gifford’s admitted awareness of City Policy Directive 269.

- The complaint advised him that providing a “false or intentionally incomplete statement” would immediately subject him to further discipline.
- Officer Gifford signed the so-called “Garrity Advisory,” containing the same basic warning.
- During the interview, the investigator assured Officer Gifford that “you need to answer all my questions and answer them truthfully.”

According to the City, the importance of police officer “truthfulness” is “self-evident.” Police Departments must maintain “an image of trust and integrity,” the City asserts. If police officers are not “honest and truthful in their dealing with their superior officers, their fellow officers, and the citizens whom they serve,” the City declares, “the ability of police departments to enforce the laws and protect communities will be destroyed.” Several court cases and an arbitration case is cited in support.

The City takes the position that the appropriate burden of proof in this particular case is the “preponderance of the evidence” standard. In the opinion of the City, “No good arguments” support the use of the “beyond a reasonable doubt” standards, which the City states is applied “uniquely to criminal proceedings.”

The City notes that, although Officer Gifford “adamantly denied that he had displayed his police badge to the Molina vehicle,” all the other witnesses testified that “he either displayed his badge or attempted to display it.” Despite the consistency of the witnesses on this point, they were inconsistent on other points. Thus, the City maintains, “the arbitrator is called upon to assess the credibility of the witnesses. Several traditional factors used by arbitrators in the credibility evaluations are cited. Specifically noted is

whether the witness appears has any personal stake in the case and whether the testimony is “corroborated by the other witnesses.”

The manner in which Lieutenant Sandell assessed the reliability of the witnesses and his conclusions in that regard are featured by the City. In this regard, the City argues:

- Despite their inconsistency on several points characterized by the City as immaterial, all the witnesses were consistent about Officer Gifford displaying his badge.
- All witnesses had a good opportunity and the ability to observe.
- The incident occurred in broad daylight and the witnesses expressed themselves clearly, displaying adequate recall.
- None of the witnesses had any interest in the proceedings or appeared to have any reason to fabricate their testimony.
- All the witnesses testified that they “like Officer Gifford” and were not aware of the reason for the discipline.

The City further argues that it was “only Officer Gifford who credibility was suspect.” The following reasons were provided in support of this contention:

- Officer Gifford may have felt defensive because he had had recently been the subject of two disciplinary actions involving questionable judgment.

- Officer Gifford may have believed he was exacerbating the first offense, initiating a traffic stop with an unmarked police vehicle, by admitting he displayed his badge.
- Officer Gifford's memory appeared to be selective, in that he was able to recall certain fact, but not others.

The "only conclusion" to be drawn under these circumstances, according to the City, is that Officer Gifford "simply lied" to Lieutenant Sandell when he denied displaying his badge toward the Molina vehicle.

Finally, the City takes the position that the discipline is appropriate. It was Officer Gifford, the City argues, who decided to follow the Molina vehicle. Further, given what the City describes as the seriousness of "untruthfulness" charge, "a 10-day suspension is likely on the low end of the reasonable end of discipline." Several cases in support of the discipline are cited.

The City anticipates the Union's position that "certain past disciplinary actions," the suspensions to Officers Sieve, support a lesser punishment. However, the City maintains, neither of these disciplinary actions were for lying in a *Garrity* interview.

In conclusion, the City refers to the decision of a well-respected arbitrator, in which it is noted that "Properly conducted Internal Affairs investigations are the primary line of defense in preserving the public's trust in law enforcement . . . If employees are left unpunished for lying . . . the Department cannot ensure the integrity and trustworthiness of the Department's police officer in the eyes of the public."

The Union

The Union begins its position statement by addressing the burden of proof. The “preponderance of the evidence standard” is recognized by the Union as an applicable guide in the “typical grievance arbitration.” However, in this case, the Union believes that the burden of proof should be the rigorous “beyond a reasonable doubt.” In support of this contention, the Union contends that the allegation involves “moral turpitude or social stigma,” citing cases for the proposition that the higher standard is appropriate. In this regard, the Union takes the position that the alleged offense is “a very serious charge for a licensed peace officer” and declares that present allegations “will do much to forever mar his reputation and affect his credibility” in all future police activities.

Despite its argument that a higher burden of proof should be adopted, the Union contends in the alternative that the City failed to establish its case under the less demanding “clear and convincing” standard. “The City based its decision to suspend Officer Gifford on the statements of three untrained teenagers . . . and the statements of two known criminal elements,” asserts the Union. Among the factors used to assess credibility, argues the Union, include the strength of recollection, refusal to cooperate with the investigation, corroboration and the how reasonable the testimony is the context of what was said by other witnesses.

The Union refers to the investigation techniques used by Lieutenant Sandell. It is significant that the question the City contends was answered untruthfully was raised only once, the Union maintains. Officer Lammle’s reference to Office Gifford raising his

badge followed a “series of leading questions” and contained several other inconsistencies.

The Union argues that the statements of the three teenage compliance checkers and the Molina brothers were not credible due to a number of inconsistencies. The Union places these various inconsistencies in several categories including the placement of Officer Gifford’s badge, whether Officer Gifford was holding his badge with his right hand or his left hand, the position of each witness in the unmarked car, what was said during the pursuit, the actions of the Molina brothers during the pursuit and the events after the stop. As an example, the Union notes that while Mr. Doig and Mr. Newville stated that Officer Gifford was holding his badge with his left hand, Mr. Rivers recalled that the opposite hand was used. As another example, the Union refers to several versions of where each compliance checkers testified relating to their relative position in the car.

The Union notes similar examples from the statements given by the Molina brothers. Both of the brothers stated that one of them was on the phone during a specific point, yet none of the officers or compliance checkers observed a telephone. The Union also credits part of the story as told by the Molina brother. For example, the Union notes that one of the brothers did not know who was chasing him and did not realize it was a police officer until both cars had stopped. The Union objects because Lieutenant Sandell concluded that these statements were more credible than that of Officer Gifford and in the case of several examples, Officer Lammle.

The Union relies on what is considers to be an important inconsistency in the various statements relating to how the Molina car ultimately stopped. It is noted that

Hector Molina did not “pull over the side of the road as would normally be expected during a routine traffic stop.” This, asserts the Union, “strengthens Officer Gifford and Officer Lammle’s testimony that neither officer identified themselves to the Molina vehicle.

According to the Union, Lieutenant Sandell “approached the investigation with what appears to be a preconceived notion of what occurred.” The Union argues that Lieutenant Sandell’s use of such terms as “traffic stop” and “pursuit” indicates a lack of objectivity. Several other examples are provided. “There is a difference between having a badge in hand and purposefully and knowingly displaying the badge in an attempt to stop a vehicle,” the Union contends. The Union refers to Officer Gifford’s testimony that he must have removed his badge from his belt at some point, but that he “knows he did not display his badge.”

Officer Gifford’s several commendations are referred to by the Union, a citation for his work in traffic enforcement and his performance evaluations in particular. It is argued that Officer Gifford “is familiar with conducting a traffic stop” and does not refer to the Molina incident as such.

In the Union’s view, the timing of the event is pertinent. The Union refers to the fact that the entire event took place very quickly, “so fast the Richfield dispatch operators did not even have a chance to respond to Officer Lammle’s request for a title check . . . The pace and quickness of the event, as well as the confusion and excitement on the part of the compliance checkers, lends credence to the idea there is no way to determine what truly happened on May 24, 2005. This fact is exacerbated, according to the Union, by its

contention that the City “performed an incomplete and biased investigation, and as such the findings made by Lieutenant Sandell should be looked at with extreme caution.

The Union contends that the “benefit of the doubt” should be “afforded” to Officer Gifford. In support, the Union offers the following:

- The City has accused a police officer of lying during an investigation, but the grievance was sustained on the grounds that the evidence was not “conclusive.”
- There are factual similarities to the prior case, including what the Union describes as the City accepting the word of an “inexperienced officer . . . and that of a known criminal element.”
- Lieutenant Sandell failed to credit what Officer Gifford stated his intent was, but instead relied on what Officer Lammle believed was Officer Gifford’s intent.
- The testimony of the young compliance checkers was “excited and full of adrenaline . . . They are inexperience, impressionable, and no doubt influenced by media representation of law enforcement.
- Officer Gifford has been a police officer for approximately 8 years and has never been known to be untruthful.
- The testimony indicated that Officer Gifford was “honest and trustworthy.”

To the Union, Officer Gifford’s “service and integrity should have played a deciding role in the decision to discipline him for something which was not conclusively established by either a preponderance of the evidence or anything closely resembling clear and convincing evidence.”

Finally, the Union argues that the discipline was too severe. In this regard, the Union maintains that Officer Gifford has never before been disciplined for dishonesty, has never been known to be dishonest and has been considered trustworthy. The Union further argues the City failed to properly consider his work performance, contending that Officer Gifford “always goes above and beyond what is expected of him.”

The discipline imposed upon Officer Sieve is referred to in support of the contention that the City “did not follow its own procedures.” In Officer Gifford’s case, the Union asserts, the discipline imposed on Officer Gifford “was harsher than a fellow officer received for the same act.” The Union takes the position that Officer Sieve included false information on a police report, but was suspended for only three days. In another untruthfulness infraction, several years later, Officer Sieve was suspended for only six days. The Union dismisses what it characterizes as the City’s attempt to distinguish these cases on the facts. “Lying is lying plain and simple,” the Union asserts.

The Union suggests that the grievance be sustained and that the ten day suspension be reversed, with appropriate compensation. The Union further requests that the position of Explorer Coordinator be restored to Officer Gifford.

Opinion

The City and the Union appear to approach this case in the same basic way. Both parties focus their arguments on the relative credibility of the witnesses. However, despite their well-stated and cogently argued positions, the appropriate resolution of this case does not depend on the relative credibility of witnesses. Rather, this case must be resolved with regard to what the record establishes regarding the circumstances and the motivations of the witnesses, as well as their individual intentions.

Certainly it is necessary and important to try, as accurately as possible, to determine what actually happened during this series of events. However, the determination of what occurred is not the only issue to be resolved. The discipline accorded to Officer Gifford was due not to what actually happened, but because of what he said about what happened in his *Garrity* interview. Officer Gifford is charged with failing to answer all of those questions truthfully. While the conflict in the statements of the witnesses is certainly sufficient to begin the inquiry, the matter is not automatically resolved through a determination of what occurred.

The Union notes, for example, that the only proof offered by the City in support of its thesis that Officer Gifford was untruthful in his *Garrity* statement are the recollections of the three compliance checkers, Officer Lammle and the Molina brothers. This evidence is insufficient to justify the discipline, asserts the Union, because of the several inconsistencies in these statements. To the Union, these statements and the subsequent testimony render the City's evidence unreliable and without any credibility.

It is certainly true that each of the City's witnesses recalled Officer Gifford displaying his badge at some point during the pursuit. It is equally true that these statements and the subsequent testimony did not perfectly conform in every conceivable respect. There are inconsistencies. The witnesses do not always agree on such issues as the alleged location of the badge, their relative positions in the vehicle, the actions of the citizens being pursued or what occurred after the vehicle was stopped.

However, these facts are not sufficient to support the conclusion that the statements of these witnesses should not be deemed credible. With the possible exception of the Molina brothers, who did not testify, the fact that the recollections of these various witnesses do not conform precisely to each other does not require that they be discarded as unworthy of belief. Although it can sometimes create bumps on the road to justice, the abilities of individuals to observe and recall a particular event or series of events are not always equal. Despite what may be a series of genuine individual good faith efforts, people often observe and recall the same event or series of events in different ways. This does not necessarily compel a conclusion that they are lying.

Apart from the obvious self-interest of the Molina brothers, the Union offers no theory to adequately explain why the compliance checkers and Officer Lammle would tell anything but the truth with respect to their observations of Officer Gifford's actions. Despite the inconsistencies contained in the statements of the City's witnesses, these statements constitute a perfectly proper and credible block of evidence establishing that Officer Gifford, at some time during the pursuit, displayed his badge at the Molina brothers through the window of the unmarked patrol car.

A similar analysis must be applied to the City's position. The City asserts that it was "only Officer Gifford whose credibility was suspect." Officer Gifford is not worthy of belief, contends the City, because he had an "ax to grind" in that he may have "felt defensive" about two recent disciplinary actions and "may have felt" that if he admitted displaying his badge "it would look even more like he was conducting a traffic stop." The City refers to the fact that, while Officer Gifford responded with specific recollections to most of the questions asked, his memory was faulty on the subject of displaying his badge. To the City, Officer Gifford's motivation to tell something other than the truth and the lack of detail in Officer Gifford's responses to the question of whether he displayed his badge was glaring, as well as revealing.

However, the circumstances of this case suggest a different conclusion. There was evidence establishing that Officer Gifford has a reputation to tell the truth. By all reports, this event was very stressful for all the participants. Such stress can affect how any individual recalls the details of a particular event.

Moreover, Officer Gifford had no motivation to lie. At the hearing, Officer Gifford unequivocally admitted that he had pursued the Molina vehicle while assigned to an unmarked patrol car, a clear violation of policy. In his *Garrity* statement, Officer Gifford did not attempt to conceal this damaging material fact, but admitted his error without evasion or equivocation. At the hearing as well as the *Garrity* interview, Officer Gifford took full responsibility for this particular violation of City policy.

In the context of his admission, it is inappropriate to attribute to Officer Gifford a motivation to deliberately make an untruthful statement. Having candidly admitted to his

misconduct in this regard, the City's suggestion that Officer Gifford had an "ax to grind" cannot be reasonably sustained.

Though not precisely applicable, many well-reasoned arbitration decisions hold that, in order to justify discipline, it must appear that an employee falsification was deliberately intended to deceive or defraud the employer. *Interstate Brands Corp.*, *supra*; *Commercial Warehouse Co.*, 62 LA 1015 (Sater, 1979), *Transco Service*, 96 LA 823 (Concepcion, 1991); *Inland Steel Products*, 47 LA 966 (Gilden, 1966); *Wager Electric Corp.*, 61 LA 363 (Ray 1973).

Without some evidence of improper motivation or adverse intention, it is extremely difficult for an impartial authority to distinguish between a good faith misstatement of fact or a genuine falsehood. Here, given the statements of all the other witnesses to this event, statements which indicate that Officer Gifford had displayed his badge, it was perfectly appropriate for the City to inquire further. However, in the absence of an improper motivation or intention, the prospect of actual deception is remote.

Despite the differences between his statement and that of the other witnesses on the question of whether the badge was displayed, the record does not support the conclusion that Officer Gifford was trying to deceive the City at his *Garrity* interview. Rather, Officer Gifford's statement appears to have been the result of a genuine mistake. Although his recollection was mistaken, there is no reason to believe that Officer Gifford's statement was, to paraphrase Department Directive No. 105, a product of anything but his best ability to recall at the time.

Having carefully considered the testimony and the exhibits received into evidence, as well as the written closing arguments submitted by the parties, it is the Arbitrator's opinion that the discipline must be reduced to a written reprimand and that there is just cause only to discipline for violation of Department Direction No. 269. The City's issuance of a 10-shift unpaid suspension to Officer Gifford on June 28, 2005, was not for just cause. Officer Gifford is entitled to any lost pay or benefits resulting from the discipline. Officer Gifford should also be reinstated to the position of Explorer Coordinator.

Accordingly, the grievance is SUSTAINED.

A W A R D

1. **IT IS THE OPINION AND AWARD** of the Arbitrator that the City of Richfield Police Department did have just cause to discipline Officer Gifford for violation of Department Directive No. 269, but did not have just cause to issue discipline for violation of Department Directive No. 105. The grievance is therefore sustained.
2. **IT IS THE ORDER** of the Arbitrator that the discipline is reduced to a written reprimand and that Officer Gifford be made whole for any and all losses of wages and benefits and that he be immediately reinstated to the position of Explorer Coordinator.

June 17, 2005
St. Paul, Minnesota

David S. Paull, Arbitrator